No. 14970.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment entered by the United States District Court for the Southern District of California, Central Division, in an action for damages for personal injuries sustained by the Appellee, Yoshio Ogawa, when he fell into an open pit in a dump yard owned and operated by the Appellant, John Furukawa, in the City of Los Angeles, State of California.

Judgment was entered on August 4, 1955 [Tr. p. 34].

Motion for new trial was filed on August 12, 1955 [Tr. p. 36] and after argument, was denied by the Court on October 17, 1955 [Tr. p. 36].

Notice of Appeal was filed on November 9, 1955 [Tr. p. 37].

Stipulation fixing the bond on appeal was filed November 9, 1955 [Tr. p. 38] and an order was made by the Court approving the bond on appeal [Tr. p. 38].

Statement of Points on Appeal was filed November 18, 1955 [Tr. p. 39].

Jurisdiction was vested in the District Court by reason of the fact that the Appellee was at all times a citizen of a foreign nation, to wit, Japan, and the Appellant was at all times a citizen of the United States. See allegations of Paragraph I, first cause of action [Tr. p. 3] and pretrial order of the District Court, Stipulation 1 [Tr. p. 15], together with finding of fact No. 1 [Tr. p. 27].

The Constitution of the United States expressly provides for the jurisdiction in the District Court of suits between a citizen of a foreign state or country and a citizen of the United States.

Constitution of the United States, Art. 3, Sec. 2.

See also:

28 U. S. C. A. 225.

An appeal from a final judgment of the United States District Court to the United States Court of Appeals is authorized by the provisions of the Judicial Code, 28 U. S. C. A. 1291.

A. Statement of the Case.

The Appellee, Yoshio Ogawa, was a gardener on September 5, 1953. He had during the course of his gardening activities loaded his truck with two bundles of cut grass and had driven to a dump yard operated by the Appellant.

Appellee had been using the dump yard for approximately two years prior to the date in question. In the dump yard there was a pit. At the time of the accident there was a cement retaining wall along three sides of the pit. The cement retaining wall extended approximately one foot above the adjacent ground and the width of the cement border of the retaining wall was approximately 18 inches.

The Appellant, John Furukawa, in addition to owning the dump yard, also owned a two-ton stake truck, which was parked in the pit. The stakes of the truck extended approximately 2 feet above the top of the cement edge of the retaining wall. The Appellee drove into the dump yard for the purpose of disposing of the refuse he had accumulated. It was customary to stand upon the cement retaining wall and throw the burlap parcel into the bed of the stake truck, thereby dropping the contents into the truck. The distance between the side of the truck and the edge or wall of the pit was approximately 1 foot to 18 inches, depending upon how closely the truck was parked to the opposite side of the pit.

Prior to the date in question, the Appellant's truck had been involved in an accident and as a result thereof, a small piece of metal which was a part of the side of the truck, was caused to protrude 2 to 4 inches above the bed of the truck. It was jagged in appearance.

Appellee was thoroughly familiar with the dumping operations of the Appellant. Although the condition of the concrete at the top of the pit varied from time to time, Appellee admitted that the cement at the top of the pit at the time of the accident was covered with grass and cut trees. This had been the same condition that he had observed on other visits to the pit.

Appellee got out of his truck, and threw one of the burlap sacks full of grass into the open truck. The manner in which the Appellee would perform the dumping operation was simple. A large piece of burlap, approximately 5 feet square, was used and the debris was placed in the center of the burlap, the ends being brought together so as to make a bundle. The Appellee would take this bundle to the edge of the pit, dumping the entire bundle into the bed of the truck which was in the pit, but retaining hold of the burlap which would then presumably be used by him in the future. In the course of dumping or dropping the second bundle, he slipped or fell and his body dropped between the space between the edge of the pit and the side of the truck. During his progress between this small space, his body came in contact with the piece of metal which has been described, and he sustained a wound on his leg,

for which injury he sought damages. No complaint is made of the amount of the judgment.

The trial Court found that the Appellant was guilty of negligence in maintaining the dump yard pit and the top of the wall in a negligent and careless manner and that he was further negligent in maintaining the truck in said pit, with the projection caused by the break in the metal which extended from the edge of the bed of the truck. The Court found that the Appellee's conduct was not *the* proximate cause of his injuries. The Court further found that Appellee "was not contributorily negligent with respect to the hazard created by said projecting metal hook * * *."

The questions involved relate to the sufficiency of the evidence to sustain the judgment in favor of the Appellee and relating specifically to the issues of negligence, proximate cause, contributory negligence and assumption of risk.

Specifications of Assignments of Error.

The specifications of error are contained in the statement of points relied upon, and are as follows:

1. There was no evidence of negligence on the part of the Appellant John Furukawa;

2. There was no evidence showing or tending to show any proximate causal relation between any act or omission on the part of the Appellant and the injury and damage sustained by the Appellee;

3. As a matter of law the plaintiff was guilty of contributory negligence;

4. As a matter of law the plaintiff assumed the risk of any injury;

5. The evidence does not support the Findings of Fact and Conclusions of Law in the following respects:

(a) The finding that the defendant was negligent is unsupported;

(b) The finding that the negligence of the defendant (52) proximately caused the injuries to plaintiff, is unsupported;

(c) The finding that plaintiff was guilty of no contributory negligence is unsupported.

SUMMARY OF ARGUMENT.

The evidence fails to establish any actionable negligence on the part of Appellant. The evidence was uncontradicted that the condition which the Appellee described was no different from that which he had observed in the two years that he had used the same pit preceding the accident. Whatever the condition was, it was *open* and *obvious*. The accident occurred in the daylight hours and there was no duty on the part of Appellant *to warn* the Appellee of any condition which may have existed at the top of the pit. The evidence demonstrates from the Appellee's own mouth, that the cause of his fall between the edge of the pit and the truck, was his own conduct in pulling too violently on the gunny sack loaded with debris.

There is no evidence to justify the conclusion that the Appellant could possibly have anticipated that anybody using the pit would fall in the small space between the edge of the pit and the side of the truck in such a manner as to come in contact with the small piece of metal which was protruding from the side of the truck. This tiny area was not one in which the Appellant could reasonably have anticipated that any person would fall or otherwise be involved. The finding that the Appellant was negligent in connection with the maintenance of the truck is utterly untenable.

Appellee was guilty of negligence as a matter of law which proximately *contributed* to his injury. As a matter of law, he assumed the risk of a fall and resulting injury. The Court's finding that the "plaintiff's conduct was not *the* proximate cause of his injuries, was not a determination by the trial court on the issue of contributory negligence, since a plaintiff is barred from recovery if his conduct is *a* proximate cause of his injuries, *i. e.,* contributes in *some* degree to his injuries.

The Court's finding that the "plaintiff was not contributorily negligent with respect to the hazard created by said projecting metal hook" was in effect a negative pregnant and clearly sustains Appellant's position that plaintiff was guilty of negligence which proximately *contributed in some degree to the happening of the accident,* particularly when viewed in the light of a finding that, "the fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery * * *."

ARGUMENT OF CASE.

I.

There Is No Evidence in the Record Sufficient to Sustain the Finding of Fact That the Appellant Was Guilty of Actionable Negligence; There Is No Evidence Sufficient to Sustain the Finding of Fact That There Was Any Proximate Causal Relationship Between Any Conduct on the Part of Appellant and the Injury or Damage Sustained by Appellee.

Under this heading Appellant will present Points 1 and 2 set forth in the statement of points on appeal [Tr. p. 39].

The facts of the case are peculiarly simple and with the exception of the evidence relating to the piece of metal extending from the bed of the truck, are uncontradicted.

Appellant maintained a private dump yard which was used by Appellee and other gardeners for the disposition of refuse and trash [Tr. p. 15]. Appellee had used this dump for approximately two years prior to the accident and paid the Appellant $8.00 per month for the privilege of disposing of trash and refuse [Tr. p. 15].

In the dump yard there was located a pit large enough to accommodate a two-ton truck owned by Appellant [Tr. p. 15]. This truck was a high stake truck. The truck was backed into a pit which had been dug into the ground in the dump yard. The pit was approximately 9½ feet wide. The truck which was parked in the pit was 8 feet in width [Tr. p. 120]. A cement retaining wall was constructed along three sides of the pit. The wall extended approximately 1 foot above the adjacent ground, and the cement border of the retaining wall was approximately 18 inches wide [Tr. p. 16].

The Appellee backed his truck to the retaining wall for the purpose of disposing of the refuse which he had accomulated during the day. It was daylight [Tr. p. 16].

Appellee stated that at the time he arrived at the pit there was grass and cut trees alongside the pit and on the cement top [Tr. p. 43. See also Pltf. Ex. 1, a photograph]. This was precisely the same condition that the Appellee had observed throughout the period of time that he had used the pit from 1951 to 1953 [Tr. p. 61].

Appellee testified: [Tr. p. 43]

> "Q. (By Mr. Greenberg): What was the condition of the cement top of the pit? A. You mean the top of the pit?
>
> Q. Yes. A. Grass and cut trees, stuff.
>
> Q. That was alongside the pit and on the cement top? A. Yes."

He further testified: [Tr. p. 61]

> "Q. On September 5, 1953, was it (referring to the condition on the top of the cement strip) any different from any other day that you had gone there? A. Same."

There was no protection or covering between the edge of the cement and the Appellant's truck which was parked in the pit. This was fully known to Appellee [Tr. p. 44]. The accident which occurred is best described by the Appellee himself [Tr. pp. 44-45]:

> "Q. Did you intend to take the grass from your truck in to the truck that was parked in the defendant's pit? A. Yes.
>
> Q. How did you do this? A. I holding the bundle sack in both hands and put it on the truck.

Q. Where did you stand when you put the sack into the defendant's truck? A. Close to the truck.

Q. On what did you stand? A. On the cement pit.

Q. After you put the bundle in the truck and after you were standing on the cement edge of the pit, what did you do then? A. Then pulled out my sack.

Q. Would you show the court how you pulled out your sack? A. Dumped in and pulled the sack.

Q. Was there any covering or protection between the edge of the cement and the defendant's truck? A. Nothing.

Q. Nothing at all? A. No.

Q. As you were standing and disposing of your rubbish, how did the accident happen? What happened? A. Pulled the sack, same time slipped the foot.

Q. And where did you fall, or did you fall? A. Between the truck and the pit wall.

Q. And then what happened? A. And then I want to get out but I can't get out. Right side of the foot catch on some iron that stick out truck side, so I hollered to help me."

That Appellee had full knowledge of the precise condition of the top of the pit, is indicated by his own testimony, described in great detail [Tr. pp. 82-83]. After describing the condition of the debris, the Appellee testified that he was standing *on* the trash close to the truck [Tr. p. 84]. He took his first gunnysack of debris toward the front of the truck and the second toward the rear [Tr. p. 85]. He could see the truck walls and knew that there was about a foot between the body of the truck and the pit wall [Tr. p. 85]. He knew that if he stepped down in between the wall of the pit and the truck body, that

he would fall in. He took the second load into the truck and still had hold of the gunnysack before he fell [Tr. p. 86].

He stated: [Tr. p. 87]

> "I noticed that the second package was heavier and harder harder to dump, so I exerted more physical strength in trying to dump the second package. * * *
>
> Q. In other words, when you threw your gunny sack into the truck and began pulling the gunny sack from under your rubbish, it was heavier the second time; is that correct? A. Yes, it was heavier and for that reason I pulled much—
>
> Q. Violently? A. Violently or stronger. * * *
>
> Q. And as you pulled you lost your balance, is that what happened? A. Yes.
>
> Q. Then what happened? A. Then I fell off.
>
> Q. There was nothing on which you were standing that caused you to slip, then, was there? A. Well, my testimony is that *because I had to pull harder my feet slipped and then went forward.*" (Italics added.)
>
> * * * * * * * *
>
> "Q. Now, on what did you slip? A. I think it was because I pulled hard." [Tr. p. 88]

As a result of his conduct the Appellee was precipitated into the 12 to 18-inch space between the pit wall and truck, and during the course of his fall from the top of the pit of the bottom of the pit, his leg hit the slightly projecting piece of metal which has been previously described.

Appellant is thoroughly familiar with the fundamental rule that ordinarily questions of negligence, proximate

cause and contributory negligence are questions of fact for the trier of fact. A well recognized exception, however, appears to this rule which is perhaps best stated by the California Supreme Court in the case of *Jacobson v. Northwestern Pacific R. R.,* 175 Cal. 468, at 473, where the court states:

> "While ordinarily the question of negligence is one of fact to be determined by the jury, nevertheless, where the undisputed evidence is such that only one inference can be drawn therefrom, or it is of a character so conclusive that the court should in the exercise of its discretion set aside a verdict not in accord therewith, the question is one of law which warrants the court in directing a proper verdict. (*Davis v. California St. Ry. Co.,* 105 Cal. 131, 38 Pac. 647; *Delaware R. R. Co. v. Converse,* 139 U. S. 469, 35 L. Ed. 213, 11 S. Ct. 569.)"

See also *Estate of Sharon,* 179 Cal. 447; *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, at 756; *McGraw v. Friend etc. Lumber Co.,* 120 Cal. 574.

From the testimony and the evidence hereinabove referred to, it is obvious that there is no foundation whatever in the record supporting the finding of actionable negligence on the part of the Appellant.

Actionable negligence involves the concept of a duty, and a breach of that duty proximately causing injury or damage to the injured party.

Smith v. Buttner, 90 Cal. 95.

As the author says in 19 Cal. Jur. p. 551:

> "These three elements—duty, breach and injury—when brought together constitute actionable negligence and the absence of any one prevents a recovery."

See also *Means v. So. Calif. Ry. Co.,* 144 Cal. 473.

It is fundamental that an invitor must exercise ordinary care to keep his premises in a reasonably safe condition for his invitees. It is equally as fundamental that an invitor has no duty to warn an invitee of an *obvious* defect or danger.

Blodgett v. Dyas Co., 4 Cal. 2d 511;

Slyter v. Clinton Const., 107 Cal. App. 348;

Shanley v. Amer. Olive Co., 185 Cal. 552;

Vitrano v. Westgate Sea Prod. Co., 34 Cal. App. 2d 462;

Funari v. Gravem-Inglis Baking Co., 40 Cal. App. 2d 25.

In the case of *Vitrano v. Westgate Sea Products Co.,* 34 Cal. App. 2d 462, the Court held as *a matter of law* that there was *no duty* to warn an invitee of an open or obvious danger. The parallel between the *Vitrano* case and the case at bar is strikingly similar. In that case the decedent was an invitee who had brought certain fish nets upon the premises of the defendant. The nets were placed in certain vats and were "tanned." The vats were filled with hot water, and the tanning process apparently was a cleaning process. The vat was 12 feet long, 6 feet wide and 4½ feet high, and on either side there was a plank or platform about 35 inches below the top of the vat, upon which the fishermen would stand while they lowered the nets into the solution. The top of this area became slimy and covered with debris during the tanning process. On the day in question the decedent apparently slipped on some of the debris and fell into the tanning vat containing the hot water, and was killed.

The Court states, at page 465:

> "Among other things, the invitor is under the obligation to warn the invitee of any dangers of which he has knowledge and which are not readily apparent to the eye. There is no such duty where the dangers are obvious or as well known to the invitee as to the owner of the premises. (*Mautino v. Sutter Hospital Assn.,* 211 Cal. 556 (296 Pac. 76).) There is no obligation to give warning of an obvious danger or one which should have been perceived by the invitee through the ordinary use of his own senses. (*Ambrose v. Allen,* 113 Cal. App. 107 (298 Pac. 169).) In *Blodgett v. B. H. Dyas Co.,* 4 Cal. 2d 511 (50 Pac. 2d 801), it is said: 'The owner of property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.' "

Of particular importance is the case of *Anderson v. Western Pacific R. R. Co.,* 17 Cal. App. 2d 244. In that case the plaintiff was apparently walking upon the premises of an open public dump to salvage some pieces of scrap iron. A bank caved in, precipitating him into a smoldering fire, as a result of which he sustained serious injuries. There was no evidence that the plaintiff was aware of any fire, although there was evidence that he walked around the edge of a hole at which point there was a strip which was black and smoky. Obviously he did not expect that the terrain he was walking on would give way. The Court concluded *as a matter of law,* that whatever condition existed, was an open and obvious con-

dition and a judgment in favor of the plaintiff was reversed on appeal.

The danger to the Appellee in this case was likewise open and obvious. The hazard was *that of falling or slipping from the top of the cement,* either against the body of the truck or between the edge of the cement wall and the body of the truck. Finding No. VIII of the trial court [Tr. pp. 28-29] is utterly unsupported by the evidence. In this finding the Court found that there was a reasonably foreseeable hazard of falling from the top of the cement retaining wall into the pit or into the truck or between the pit and the truck.*

The Court then reaches the most astounding finding of fact that "It was reasonably foreseeable that the results of such a fall would be *minor* cuts, skin burns or bruises" [Tr. p. 29]. How any Court could find that a human body, caused to fall between the edge of a concrete pit and the body of a truck composed of wood and metal, might result in only minor cuts, skin burns or bruises, is utterly beyond the comprehension of Appellant. Obviously the type or character of an injury from such a fall would depend entirely upon how the person fell; whether feet first or head first, or what particular angle was involved in the fall. If the Appellee had fallen head first into the pit and had struck the ground with his head, he might easily have been killed. He might have struck his head against some part other than the jagged, protruding piece of metal and suffered injury far more severe than striking the jagged piece of metal, as for ex-

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*Obviously this finding was necessary, since the evidence is uncontradicted that the condition of the top of the pit was open and obvious and that there would clearly be a foreseeable hazard to the plaintiff of falling into the area described in the finding.

ample, a windwing, or a bumper or sideview mirror, a tail lamp or a hubcap, etc. It is submitted therefore that the hazard to Appellee was not that of being injured by the metal hook, but was the hazard of falling between the edge of the pit and the truck. It was only a happenstance that he struck the metal hook. It might well be that his striking of the metal hook may have prevented far more serious injury. *Obviously he did not intend to fall in the area and strike any portion of the truck,* whether it was the metal projection or otherwise.

The Court's finding in this regard, is based upon pure speculation and conjecture and is insufficient to support the judgment.

In *Reese v. Smith,* 9 Cal. 2d 324, at 328, the Court states:

> "If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish the fact should suffer, and not his adversary * * * a judgment cannot be based on guesses or conjectures."

See also:

McKellar v. Pendergast, 68 Cal. App. 2d 485;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751.

The area between the edge of the pit and the truck was not one where it was anticipated that persons would be *in any event.* The uncontradicted testimony is that the cause of the Appellee's fall was the fact that he pulled *too violently* upon the burlap sack and that as a result he lost his footing. This was the sole proximate cause of his subsequent fall and injuries.

Probably Appellant's position may best be illustrated by another quotation from the case of *Vitrano v. Westgate Sea Prod. Co.,* 34 Cal. 2d 462, at 467, where the Court states:

> "The danger being as obvious to the deceased as it could have been to the respondent, we think the evidence fails to show negligence on the part of the respondent in failing to warn the deceased of the danger and, as was said in *Weddle v. Heath, supra,* 'On the same facts it necessarily follows that the plaintiff was guily of contributory negligence.'"

II.

The Evidence Establishes As a Matter of Law That the Appellee Was Guilty of Contributory Negligence and That He Assumed the Risk of Any Injury.

This point is covered in Points 3, 4 and 5 of the Statement of Points on Appeal [Tr. p. 39]. The defense of contributory negligence was appropriately raised by answer [Tr. p. 14].

The trial Court made a most peculiar finding with respect to the conduct of the Appellee. Since the evidence was uncontradicted that the cause of the fall was the Appellee's own conduct in pulling too hard upon his gunny sack when he was standing on the cement wall which was covered with debris of which he had full knowledge, the Court found that the plaintiff *did foresee* the ordinary and reasonably foreseeable hazard of falling into the pit, or the truck, or the space between the truck and pit, and the reasonably foreseeable results of such fall [Finding No. XV, Tr. p. 30]. There is not one scintilla of evidence which would justify this finding, and Appellant challenges Appellee's counsel to point to any evidence in

the record which would justify the conclusion that the Appellee foresaw that there was an ordinary or reasonable hazard of falling into the pit and thereby sustaining minor bruises or cuts. The Court then found that the plaintiff was *not contributorily negligent as to the unknown hazard,* to wit, the piece of projecting metal from the bed of the truck [Tr. p. 30]. *No such limited issue was raised.*

At the pre-trial the Court properly conceived the issue of contributory negligence and it was set forth in the pre-trial order [Tr. p. 17] as follows:

> "(5) Did plaintiff's conduct constitute contributory negligence?
>
> "(6) Was plaintiff's conduct *a* proximate cause of the injuries sustained by plaintiff?" (Italics added.)

It is fundamental in California that contributory negligence, is negligence on the part of a person injured which cooperating in *some degree* with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. (Calif. Jury Instructions Civil (BAJI) 3rd Revised Ed., p. 139.) See also *Harrison v. Harter,* 129 Cal. App. 22; *Meredith v. Key System Transit Co.,* 91 Cal. App. 448.

As the Court states in *Markham v. Hancock Oil Co.,* 2 Cal. App. 2d 392, at 394:

> "It is well settled that any negligence on the part of a plaintiff which contributes even in a *slight degree* to an accident, is contributory negligence which will bar a recovery."

See also:

Robbins v. Roques, 128 Cal. App. 1;
Steinberger v. Calif. Elec. etc. Co., 176 Cal. 386;
Creamer v. Cerrato, 1 Cal. App. 2d 441;
Holibaugh v. Ito, 21 Cal. App. 2d 480.

The Court concludes its Finding No. XV with the following: "That plaintiff's conduct was not *the* proximate cause of his injuries" [Tr. p. 30]. In his conclusions of law, the Court continues the same finding with reference to the conduct of the Appellee, in the following language: "That plaintiff's conduct was not *the* proximate cause of injury caused to plaintiff by the unknown and unforeseeable hazard of said projecting hook [Conclusion of Law No. VII, Tr. p. 32].

The findings obviously create a negative pregnant. Finding of Fact No. VIII contains the implied finding that the Appellee himself knew of the hazard of falling from the top of the cement wall.

No Finding Was Made by the Trial Court With Reference to the Conduct of the Appellee in Pulling on the Burlap Bag, Thereby Precipitating Himself Into the Area Between the Cement Wall and the Truck.

The Court's finding on the issue of contributory negligence is actually a negative pregnant, since in Paragraph XV the Court finds that the plaintiff was not contributorily negligence as to the hazard, unknown to him, and unforeseeable by him, but known to said defendant, of being cut, hurt, injured and impaled upon said projecting metal hook [Tr. p. 30]. Likewise in the conclusions of law, Finding V, the Court found: "That plaintiff was not contributorily negligence with respect to the hazard cre-

ated by said projecting metal hook, known to said defendant but unknown to plaintiff, and unforeseeable by plaintiff in the exercise of reasonable care."

That this creates a negative pregnant is obvious since the plaintiff may well have been contributorily negligent with respect to his conduct in permitting himself to slip or fall from the top of the cement wall. The Court has obviously limited its finding with respect to the contributory negligence to only *one phase* of the Appellee's conduct.

It is well settled that the conduct of the plaintiff need not be *the sole* proximate cause. If the plaintiff is guilty of any contributory negligence which is *a* proximate cause of injury, *he cannot recover.*

It is obvious that the findings were prepared by the Appellee's counsel. The evidence from the Appellee himself does not even remotely suggest that he foresaw the consequences of his fall or that he assumed that if he did fall he would receive only minor cuts, skin burns or bruises. There is not one word of testimony in the very short record which would justify such a finding and which finding is the basis for the entirely erroneous theory which has been set forth in the findings.

The case of *Funari v. Graven-Inglis Baking Co.,* 40 Cal. App. 2d 25 (Petition for hearing denied by Supreme Court) is particularly interesting because the Appellate Court held as a matter of law that the Appellant was guilty of contributory negligence. There, as here, the Appellant slipped. He was attempting to load an elevator and was fully conscious of the slippery condition of the floor on which he was working. Both feet slipped out from under him and he fell backward, striking his head

and shoulder against a door on the far side of the elevator and his back on a projecting wooden lip at the base of the door. The Appellate Court, after reviewing the evidence, held clearly that the plaintiff's conduct was such as to stamp him guilty of contributory negligence as a matter of law. There, as here, the hazard to the plaintiff was the danger of slipping. The fact that he fell backward and struck his head against the door was an immaterial factor in the case. He could just as easily have slipped forward and broken his leg. The result would have been no different. His conduct is to be governed by the nature and character of the condition under which he undertook to perform the physical movements which brought about his fall.

See also:

Vitrano v. Westgate Sea Products Co., 34 Cal. App. 2d 462.

In *Slyter v. Clinton Construction Co.,* 107 Cal. App. 348, plaintiff was injured when a brick fire wall, to which he and several other plasterers had attached a scaffolding, gave way. The fire wall was not intended for such use and the Court held that as a matter of law plaintiff was guilty of contributory negligence. In a particularly cogent statement, the Court asserted (at p. 355):

> "From the facts it is clear that the plaintiff, as readily as the appellant, or any other person, by the exercise of his faculties of sight and judgment in an ordinarily diligent manner, could have observed and known of the danger attending the hanging of heavy scaffolding over an eight-inch fire wall such as involved in this action. Indeed, no one but a person entirely bereft of all common sense could have failed to perceive, upon mere casual observation, the danger

> of using scaffolding so hung upon which to work. It is therefore, plain that plaintiff, in entering upon the employment under such conditions, while in the prosecution of which he suffered injury, himself assumed the risk of the employment. It is not a case in which even Knowles, much less appellant, was required to instruct or warn plaintiff of the danger of working on the scaffolding hung on such a flimsy structure."

To use an analogy, in the *Slyter* case the hazard was the danger of the falling of the wall. The precise injury to the plaintiff in that case might have varied, depending upon his position on the wall. Assume for example that in the *Slyter* case the owner of the premises had permitted a jagged piece of metal to remain in close proximity to the fire wall, but which piece of metal for some reason or other was not observable to the plaintiff. The effect of the trial Court's holding in the instant case would be to say that the contributory negligence of the plaintiff in the *Slyter* case in mounting the fire wall was to be ignored, since he could appreciate that danger, but did not know about the danger of the metal. The result would be ridiculous.

It is obvious from the Findings of the Court and from the Trial Memorandum of the Plaintiff [Tr. p. 19] that it is contended that the Appellee was not guilty of contributory negligence because he did not know of the defect in the truck. This cannot relieve him of a charge of contributory negligence. It is not necessary that the precise injury or hazard must have been in the mind of the Appellee in order to establish that his negligence in attempting to throw the burlap bag into the truck when he was knowingly standing upon cut grass and debris which

was on the top of the cement wall surrounding the pit, in order that he be found guilty of contributory negligence which in some manner proximately brought about his injuries. It is well settled that in determining the issue of proximate cause in so far as it relates to the issue of contributory negligence, the same standards should be applied to the plaintiff as are applied to the defendant.

As is stated in 65 Corpus Juris Secundum, at page 745:

> "In determining whether the negligence for which plaintiff is responsible is a proximate or remote cause of injury, the same tests must be applied as in determining whether the negligence for which defendant is responsible is a proximate or remote cause thereof."

See:

Postal Telegraph etc. v. Saper, 108 S. W. 2d 259 (Texas Civil Appeals).

It is submitted that the Appellee's injuries were the result of an accident which occurred when the Appellee slipped upon the debris covered surface of the top of the concrete wall. That he was guilty of contributory negligence in attempting to perform the act of throwing his cut grass into the truck, is demonstrated by the evidence and is inherent in the Court's own finding that "plaintiff did foresee the ordinary and reasonable foreseeable hazard of falling into the pit or the truck or the space between the pit and the truck and the reasonable foreseeable result of such fall" [Tr. p. 30, Finding No. XV].

In the case of *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, the Court held as a matter of law that the plaintiff was not entitled to recover because he was guilty of contributory negligence. He apparently went upon a roof which was slippery with water and was

endeavoring to cover a hole in the skylight. He slipped and fell and as a result thereof crashed through the skylight and was injured. The Court states at page 757:

> "Here, according to the complaint, the roof was wet and slippery, due to which plaintiff fell. He was sent therefor the express purpose of stopping the flow of water through the skylight, and the wet condition of the roof was, of course, obvious. As a matter of common experience he must have known that this condition would probably render the surface slippery and a source of danger (*Peterson v. American Ice Co.,* 83 N. J. L. 579 (83 Atl. 872, 47 L. R. A. (N. S.) 144).) While the degree of care required remains constant the acts necessary to constitute such care may vary according to circumstances (*Henderson v. Los Angeles Traction Co.,* 150 Cal. 689 (89 Pac. 976)), and a reasonably prudent man under the circumstances alleged would have foreseen the possibility of injury from the condition described and used care in proportion to the danger. By the use of such care, namely, ordinary care, any injury to appellant due to the slippery condition of the roof could have been avoided."

Assume that in the case just cited the plaintiff had alleged that he was fully aware of the hazard of slipping and falling through the skylight. Assume that inside the building the defendant had permitted some sharp object or objects to be directly underneath the skylight and that the plaintiff had no knowledge of their presence. Could it be asserted that merely because he had no knowledge of the presence of such objects underneath the skylight, that his antecedent conduct in attempting to work in proximity to the skylight on the slippery footing, was not a contributing factor to his ultimate injuries? Appellant

thinks not, and can see no distinction between the illustration given and the Appellee's contentions in the case at bar.

Conclusion.

It is respectfully contended that the Appellant has sustained his burden of demonstrating that the judgment entered in favor of the Appellee was a miscarriage of justice, and that the evidence was insufficient to support the findings of fact, conclusions of law and judgment, and that the Appellant was not guilty of any actionable negligence, and that in any event the Appellee was guilty of negligence which as a matter of law proximately contributed to his own injury. The judgment in favor of Appellee should be reversed.

Respectfully submitted,

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